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Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1136

MURRAY TILLMAN, ET AL., PETITIONERS

v.

WHEATON-HAVEN RECREATION ASSOCIATION, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. B) are reported at 451 F. 2d 1211. The opinion of the district court (Pet. App. C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1971. A petition for rehearing, with suggestion for rehearing *en banc*, was denied on December 16, 1971 (Pet. App. B). The petition for a writ of certiorari was filed on March 13, 1972, and was granted on May 15, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether membership in a community recreation facility, as an incident to the ownership or rental of real property located within a prescribed geographic area, is a property right within the meaning of 42 U.S.C. 1982 which may not be denied to a resident of the area, and the use of which may not be restricted, solely on the basis of race.

STATUTES INVOLVED

Section 1982 of Title 42, United States Code provides:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

Section 2000a(a) of Title 42, United States Code, provides:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion or national origin.

Section 2000a(e) of Title 42, United States Code, provides in relevant part:

> The provisions of this title shall not apply to a private club or other establishment not in fact open to the public * * *.

INTEREST OF THE UNITED STATES

The United States has a continuing interest in, and responsibility for, eradicating discriminatory practices which deny to members of any group, on account of their race, access to residential communities, to places of public accommodation or to community recreational facilities. This is especially applicable to practices which deny to individuals, on the basis of race, the same benefits that are accorded to their neighbors in the community in which they reside, thereby encouraging segregated housing arrangements. See Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1982; Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a; and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.* Our participation here is in accordance with the government's participation in such cases as *Palmer* v. *Thompson*, 403 U.S. 217; *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229; *Daniel* v. *Paul*, 395 U.S. 298; *Hunter* v. *Erickson*, 393 U.S. 385; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Boynton* v. *Virginia*, 364 U.S. 454; and *Shelley* v. *Kraemer*, 334 U.S. 1.

STATEMENT

1. Petitioners are Negro and white homeowners in Silver Spring, Maryland, who reside within a three-quarter-mile radius of the swimming pool operated by respondent Wheaton-Haven Recreation Associa-

tion, Inc. ("Wheaton-Haven").[1] They commenced this action for declaratory and injunctive relief, and for damages, in the United States District Court for the District of Maryland, claiming, *inter alia*, that the denial of pool membership to Negro residents of the area, and of pool privileges to Negro guests of white members, violates the provisions of the Civil Rights Act of 1866 by depriving them, solely on the basis of race, of a property interest protected by 42 U.S.C. 1982. Petitioners also claimed that Wheaton-Haven is a place of public accommodation within the meaning of Title II of the Civil Rights Act of 1964 (42 U.S.C. 2000a(b)), and is not within the "private club" exemption (42 U.S.C. 2000a(e)) from that Act's requirement of non-discrimination.

The material facts are essentially set forth in the opinion of the court of appeals (Pet. App. B–2 to B–3). Wheaton-Haven, a non-profit Maryland corporation, was organized in 1958 for the purpose of operating a swimming pool in Silver Spring, Maryland. Use of the pool is limited to Wheaton-Haven members and their guests. Under the association's by-laws, membership is "open to 'bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool'" (Pet. App. B–2). The pool

[1] One of the Negro petitioners, Mrs. Roemer, is not a resident of the area, but is a friend of white petitioners, Mr. and Mrs. Tillman, who own a home in the area and are members of the Wheaton-Haven pool. Mrs. Roemer was not permitted to use the pool as the Tillmans' guest.

financed by subscriptions for membership collected from residents within the prescribed area."

Membership in Wheaton-Haven is by family units rather than by individuals; it is limited to 325 families. Persons living outside the three-quarter-mile radius may, on the recommendation of a member, be accorded membership so long as outside members do not exceed 30 percent of the total Wheaton-Haven membership. All applicants must be approved "by an affirmative vote of a majority of those present at a regular membership meeting, or a regular meeting of the Board of Directors, or a special meeting of either group called for this purpose'" (Pet. App. B–2). If a resident member—*i.e.*, one who owns a home within the designated three-quarter-mile radius—sells his property and resigns his membership, the purchaser of his home has a first option to purchase the membership, subject to the approval of the Board of Directors.

Two of the petitioners, Dr. and Mrs. Harry C. Press, are Negroes who own a home within the three-quarter-mile radius of the pool. The person from whom they purchased the premises had not been a member of Wheaton-Haven. Dr. Press tried to apply for pool membership in the spring of 1968, but the association's Board of Directors refused to provide him a membership application. It was stipulated that the sole reason for this refusal was his race (Pet. App. B–3).

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[1] A Virginia building contractor constructed the pool, and real-estate machinery (*i.e.*, pumps, a motor and a chlorine [illegible]) is used to operate it. There are snack vending machines [illegible] the sides of the pool. The facilities are in an enclosed [illegible] to which only the members and their guests are admitted (Pet. App. B–3).

Two other petitioners, Mr. and Mrs. Murray Tillman, are white members of Wheaton-Haven. In July 1968, they invited a Negro woman, petitioner Rosner, to the pool as their guest and she was admitted. On the following day, the association's Board of Directors held a special meeting and adopted a rule limiting guests to relatives of members. Thereafter, Mrs. Rosner was denied admission to the pool. It is undisputed that the sudden limitation on guest privileges was due principally to the initial admission to the pool of Mrs. Rosner as a guest of the Tillmans.[1]

2. The present action was commenced against Wheaton-Haven and its officers and directors, challenging under the Civil Rights Acts of 1866 and 1964 the association's refusal, solely on the basis of race, to extend to petitioners membership and guest privileges in the community swimming pool. The district court held (Pet. App. C) that Wheaton-Haven is exempt from the non-discrimination provisions of both statutes as a "private club" within the meaning of 42 U.S.C. 2000a (e), and thus that it can "engage in the admitted exclusion of Negro members and guests solely on racial grounds" (Pet. App. C-9). It granted the defendants' motion for summary judgment.

On appeal, a divided panel of the Fourth Circuit affirmed (Pet. App. B). The majority held that the procedures adopted by Wheaton-Haven for determining membership eligibility are sufficiently distinguish-

[1] At the annual meeting of the members of Wheaton-Haven in the fall of 1968, a resolution was adopted reaffirming the new guest policy. The need to reduce the number of guests using the pool was given as an additional justification (Pet. 5).

able from those in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, that *Sullivan* is not controlling here. The dispositive question, it concluded (Pet. App. B–5 to B–7), is whether Wheaton-Haven qualifies for the "private club" exemption from the requirement of non-discrimination in the Civil Rights Act of 1964, 42 U.S.C. 2000a. Finding that it did (Pet. App. B–17 to B–23), the court declined to consider whether "Wheaton-Haven's racial limitation on membership is forbidden by the 1866 Civil Rights Act * * *" (Pet. App. B–5), since, in its view (Pet. App. B–6), the "[private club] exception [in the 1964 Act] to the ban on racial discrimination of necessity operates as an exception to the Act of 1866, in any case where that Act prohibits the same conduct which is saved as lawful by the terms of the 1964 Act."

The dissenting judge, while noting that "the details differ," was of the opinion that "this case is indistinguishable in all material aspects from *Sullivan* * * *" (Pet. App. B–25). He concluded that the denial of membership and guest privileges to these petitioners solely on racial grounds was an impermissible deprivation of rights explicitly protected by 42 U.S.C. 1982. Moreover, he questioned "the pertinency of the claim that the Civil Rights Act of 1866 is circumscribed or limited by the Civil Rights Act of 1964" (Pet. App. B–27), since, in his view, "Wheaton-Haven is not a private club" (*ibid.*). A petition for rehearing and suggestion for rehearing *en banc* were denied, with two additional judges dissenting (Pet. App. B–30 to B–31).

ARGUMENT

I

INTRODUCTION AND SUMMARY

This case raises again the question whether 42 U.S.C. 1982 prohibits a corporate community recreational facility from discriminating on the basis of race with respect to member and guest privileges in a community swimming pool, access to which is available to all white residents as an incident of their ownership or rental of property within a stated geographic area. The Court responded affirmatively to this question in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, on facts that in our view are not substantially different from those involved here. For reasons to be stated, it seems to us to follow from *Sullivan* that, under Section 1982, Wheaton-Haven cannot in this case discriminatorily exclude Negroes from its membership.

The path leading to a proper resolution of the issue presented here has been well marked by prior decisions of this Court. In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, the Court construed Section 1 of the Act of 1866 as reaching not only public, but also wholly private, racial discrimination with respect to the sale or rental of real estate. It held (392 U.S. at 436) "that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein—including the right to purchase or lease property." For, as the Court observed (392 U.S. at 443):

> Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to "go and come at pleasure" and to "buy and sell when they please"—would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.

The *Jones* ruling necessarily applies to all transactions covered by 42 U.S.C. 1982, a provision which derives from Section 1 of the Civil Rights Act of 1866. *See Sullivan* v. *Little Hunting Park, Inc., supra,* 396 U.S. at 237.[4] But whether that statutory protection bars

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[4] Section 1 of the Civil Rights Act of 1866 (14 Stat. 27) read as follows:

"That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any

racial discrimination "in the provision of services or facilities in connection with the sale or rental of a dwelling" (392 U.S. at 413) remained an open question after *Jones*.[8]

This Court provided the answer two years later in *Sullivan* v. *Little Hunting Park, Inc.*, *supra*. That case involved—as does this one—the denial on racial grounds of a membership interest in a community recreational association, the principal benefit from which was use of the neighborhood swimming pool open to white residents living within a stated geographic area. In *Sullivan*, a white resident of the area attempted to assign to his Negro tenant as part of the leasehold interest one of his two membership shares in the association; the assignment was not approved by the association's Board of Directors solely for racial reasons (396 U.S. at 234–235). This

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law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The "property" clause became separated when the rest of the provision, slightly expanded and made applicable to resident aliens as well, was re-enacted in *haec verba* as Section 16 of the Enforcement Act of May 31, 1870 (16 Stat. 140, 144). The property guarantee remained available to citizens alone as part of the 1866 Act, the whole of which was re-enacted (by reference only) by Section 18 of the Enforcement Act of 1870. This division was formalized in the Revised Statutes of 1878, the "property clause" being codified as Section 1978, the rest as Section 1977, and persists today in Sections 1982 and 1981 of Title 42 of the United States Code.

[8] The Court there stated in the margin (392 U.S. at 413–414, n. 10): "* * * we intimate no view upon the question whether ancillary services or facilities of this sort might in some situations constitute 'property' as that term is employed in § 1982 * * *."

Court held that the Board's action violated 42 U.S.C. 1982, "whether the membership share be considered realty or personal property" (396 U.S. at 236). It was a clear interference with the Negro tenant's protected right under the statute "to * * * lease * * * property." Any narrower "construction of the language of § 1982 would," the Court concluded (396 U.S. at 237), "be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866 * * *."

As the court below correctly stated (Pet. App. B–10), "*Sullivan* thus decided affirmatively a question expressly reserved in *Jones*—whether an incident to a transaction in which parties are protected from racial discrimination by § 1982 is similarly protected." In light of *Sullivan*, therefore, the issue in the present case is whether the acquisition of membership in Wheaton-Haven is an incident of a protected sale or lease of property.

In holding that it is not, the court of appeals unconvincingly distinguished the "resident" requirement for membership in Wheaton-Haven—*i.e.*, "open to 'bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool' " (Pet. App. B–2)—from what it characterized as the homeowner (either by purchase or lease) requirement for membership in Little Hunting Park. The former, it stated (Pet. App. B–15), is not, as it assumed the latter to be, "unequivocally tied to the land"; it is, rather, "an area preference, and nothing more" (Pet. App. B–16).

Perhaps not itself persuaded that this formalistic

difference between resident membership and so-called homeowner membership provided a sufficient basis for declining to follow *Sullivan*, the court proceeded to stand this Court's analysis in *Sullivan* on its head. Instead of resolving the issue in terms of the protection afforded under Section 1982 of the 1866 Act, which, as recognized in *Sullivan* (396 U.S. at 237), was not in any way curtailed by the "public accommodations provision of the Civil Rights Act of 1964 * * *," it ruled that the earlier statutory provision was "unavailable to the [petitioners] as a separate and independent basis for relief" (Pet. App. B-7). In its view, the question turned only on whether Wheaton-Haven was a covered establishment which was barred from discriminating under the 1964 Act. As it stated (*ibid.*): "If Wheaton-Haven is a private club as defined in the 1964 Act, the exemption contained in that Act is equally applicable to the earlier statutes." The conclusion that "[f]rom the standpoint of all the relevant factors taken as a whole, [the association] has demonstrated that it is private, within the meaning of the federal statute" (Pet. App. B-22), is, we submit, both legally and factually erroneous.

II

RACIAL DISCRIMINATION WITH RESPECT TO MEMBERSHIP IN WHEATON-HAVEN RECREATION ASSOCIATION, INC., VIOLATES SECTION 1 OF THE CIVIL RIGHTS ACT OF 1866 AND IS NOT AUTHORIZED BY THE "PRIVATE CLUB" EXCEPTION TO THE CIVIL RIGHTS ACT OF 1964

A. SECTION 1982 PROHIBITS RESPONDENTS' CONDUCT

Section 1982 of the Civil Rights Act of 1866 guarantees all citizens "the *same* right * * * as is *enjoyed*

by white citizens * * * to * * * purchase, lease, sell, hold, and convey real * * * property." [Emphasis added.] Implicit in that guarantee is the right to the same use and enjoyment of the property and all its incidents as a white citizen would receive. This includes access to recreation facilities available to all residents in a particular community as an incident of their ownership or rental of real property there. *Sullivan* v. *Little Hunting Park, Inc., supra.* As underscored by this Court's decision in *Sullivan*, such community recreation facilities, especially swimming pools, are a major factor affecting the desirability and value of home acquisitions and rentals in a residential area. The discriminatory exclusion of Negroes therefrom would both discourage them from buying or leasing in the community and render any purchase or lease they did make a poorer bargain than that which a white citizen could obtain. "Solely because of their race, non-Caucasians [would] be unable to purchase, own and enjoy property on the same terms as Caucasians." *Barrows* v. *Jackson*, 346 U.S. 249, 254. There is no more room under Section 1982 for perpetuating neighborhood segregation by such indirect means than there is for direct racial discrimination in the sale or rental of real property.

After this Court's decision in *Jones, supra*, we think there can be no doubt that a developer who installs a recreational facility in a real estate development is barred by the property clause of the 1866 Act from selling or leasing property therein to whites with, and to Negroes without, access to the commu-

nity facility. On this point, the court below seems to agree (Pet. App. B–16); but it would go no farther, limiting the reach of the statute in areas not involving state action to the real estate developer, who, in the court's view, is alone forbidden from discriminating on the basis of race with respect to the use of the neighborhood swimming pool. This conclusion is, however, premised on a faulty characterization of the type of swimming facility to which *Sullivan* applies as one "of the sort of recreational facilities installed in modern real estate developments, which are included by the developers to enhance their sales of individual properties, and which are 'private' in the sense that they serve only those persons who purchase from the developers" (Pet. App. B–16).[6]

The Little Hunting Park pool was manifestly not part of a unified development plan. It was built and operated by a voluntary organization formed by an associated group of neighborhood residents who lived within a stated geographic area.[7] The difference is not without significance. In forbidding racial discrimination with respect to pool memberships in Little Hunting Park, Inc., the Court in *Sullivan* clearly recognized that Section 1982 is no less applicable because

[6] The suggestion by the court below (Pet. App. B–11, B–15, n. 16) that *Sullivan* turned largely on the fact that the membership policy there involved—supposedly based on property ownership rather than residency—"encouraged the development of absentee landlords dealing commercially in membership shares" is without foundation. Nothing in the *Sullivan* record indicates that such a practice existed; nor does this Court's opinion mention the possibility.

[7] See the Appendix in *Sullivan*, No. 53, October Term, 1969, pp. 24–26, 45.

the facilities are provided by a separate and ostensibly private membership corporation, to which belong only some of the residents of the community served, but which has as its only expressed standard for membership the applicant's residence in a specified geographic area.

It is agreed that that is precisely the corporate structure of the association under attack in the present case (Pet. App. B–16). In opening its membership to "'bona fide residents (whether or not homeowners) of the area within a three-quarter mile radius of the pool'" (see p. 4 *supra*), Wheaton-Haven made access to the community facility it operates an incident to owning or leasing a home within a defined geographic circle. Without such a possessory or leasehold interest, a person does not qualify as a "bona fide resident"; with it, he is, without further qualification, recommendation or nomination, eligible for membership. And while his application requires the approval of the association's members or its Board of Directors, the record here shows that such approval was—as in *Sullivan*, where membership was also subject to Board approval (396 U.S. at 234)—essentially a mere formality; it had, but for this instance and one other,[8] been routinely obtained. In short,

[8] In Wheaton-Haven's 11-year history, only one white person had been rejected for membership by the Board; the record does not reveal the reason for this rejection (Pet. App. B–21). Similarly, in the 12-year history of Little Hunting Park, Inc., it, too, had rejected but one white applicant for membership (see the Appendix *Sullivan*, in No. 33, October Term 1969, p. 107). Although respondents' counsel suggested at oral argument in the court of appeals that white prospective members of Wheaton-Haven have in the past been "informally" re-

access to the pool is, for whites, simply an aspect of living in the area, subject only to paying for the privilege.

In such circumstances, exclusion from Wheaton-Haven membership of Negroes residing within a three-quarter-mile radius of the pool, admittedly for no reason other than race (see p. 5, *supra*), constitutes an obvious abridgment or dilution of the right to acquire a home. *Sullivan* v. *Little Hunting Park, Inc.*, *supra*. Petitioners Dr. and Mrs. Press were in effect told: You may buy or rent a house in the designated area, but you may not acquire the right to use the community facilities which are open to your white neighbors. To permit such a result is to break the statutory pledge to the Negro, embodied in Section 1982, that he shall enjoy "the *same* right * * * as * * * white citizens" (emphasis added). As this Court made clear in *Jones* (392 U.S. at 443) and reaffirmed in *Sullivan* (396 U.S. at 237), that pledge is not susceptible of a narrow construction that would preclude discrimination only in the actual sale or rental of the dwelling involved, allowing it to continue with reference to the incidents of ownership or possession. This was, indeed, the clear import of Senator Trumbull's speech of January 29, 1866, introducing the bill which later became the Civil Rights Act of 1866:

> This measure is intended to give effect to that declaration [the Thirteenth Amendment] and

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jected, the statement is in direct conflict with respondents' own answers to petitioners' interrogatories (see Pet. 13), and as the court below stated (Pet. App. B-21, n. 23), finds no support in the record of this case.

> secure to all persons within the United States *practical* freedom. *There is very little importance in the general declaration of abstract truths and principles unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits.* * * *[9]*

It is, we submit, no answer to characterize the membership policy of Wheaton-Haven as "an area preference, and nothing more" (Pet. App. B–16), as did the court below. To be sure, the by-laws of the association permit a limited number of nonresidents, on the recommendation of a resident member, to become members of the community facility (see p. 5, *supra*). But so, too, did Little Hunting Park, Inc., accept a limited number of nonresident members.[10] That, however, does not alter the fact that those who are "bona fide residents" within a three-quarter-mile radius of the Wheaton-Haven pool can, if they are white and desire a membership, enjoy access to the community facility as an incident of owning or leasing a home nearby. Section 1982 requires that the "same right" be accorded to Negro residents similarly situated who wish to use the pool.

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[9] Cong. Globe, 39th Cong., 1st Sess., p. 474, quoted in *Jones* at 392 U.S. 431–432; emphasis supplied.

[10] Under the Little Hunting Park by-laws, a person could—as in the present case—retain his membership after he moved away from the prescribed area. Moreover, if one owned real estate in the area but did not maintain a residence there, he was entitled to membership. And, at least 25 of the 133 nonresident members of Little Hunting Park apparently lived outside the area and owned no property within it at the time that they became members. See the Appendix in *Sullivan*, No. 33, October Term 1969, pp. 163–164, 221.

Any other result would not only deprive black citizens of benefits guaranteed by the statute as an incident of their "purchase" of property.[11] It also would deny them the added value that could otherwise be realized on a *sale* of their property if they were—like white resident members of Wheaton-Haven—in a position to transfer to the purchaser a first option to become a member (see p. 5, *supra*). Nor do we believe that this point can be brushed aside, as the court below tries to do (Pet. App. B–12 to B–13), on the ground that such an option is "a thing utterly without use or value" (Pet. App. B–13). To be sure, since it operates "to vault a resigning member's vendee over the heads of persons on the waiting list to receive immediate consideration for a newly vacated membership" (Pet. App. B–12), it is most valuable "when the membership rolls are full, and a waiting list exists" (*ibid.*). But that could well be the situation at the time Dr. and Mrs. Press decide to sell their property. Indeed, as the court below acknowledges (Pet. App. B–30), such was in fact the case "when Dr. Press first became interested in considering a possible application for membership"; a smaller membership list thereafter is no basis for declaring valueless an option to be transferred at some time in the future. As the dissent below observed (Pet. App. B–26): "Even

[11] As pointed out in the dissent below (Pet. App. B–26): "It is immaterial that a tenant claimed membership in Little Hunting Park under a lease, while Dr. and Mrs. Press base their claim on ownership of real property situated less than three-quarters of a mile from the pool. Section 1982 protects the rights to 'purchase' and 'hold' property no less than the right to 'lease.'"

though the present value of an option cannot be readily ascertained, a dollar in the hands of Dr. and Mrs. Press, in the language of *Jones* v. *Alfred H. Mayer Co.*, should be able to purchase at least the same thing as a dollar in the hands of their white neighbors. Section 1982 should not be construed to deny a bargain on the basis of race."

Moreover, even at present the right to transfer a first option, afforded by a Wheaton-Haven membership, is no more a "functional nullity", in the words of the court below (Pet. App. B–13), than was the right of assignment, afforded by membership in Little Hunting Park, that this Court found to be of some value in *Sullivan* (396 U.S. at 236–237). For, the tenant who received the assignment of membership in *Sullivan*—like the purchaser who would now receive a first option from a member of Wheaton-Haven, when the membership list is *not* full—was eligible in his own right as a lessee to acquire membership in Little Hunting Park, Inc., open to all adult persons who "*reside in* or who own, or who have owned housing units" (emphasis supplied).[*] He gained no particular advantage by virtue of the assignment, which was also subject to Board approval (see p. 15, *supra*). As the dissent below properly concluded (Pet. App. B–27):

> Little Hunting Park's transfer by assignment and Wheaton-Haven's use of an option differ only in form, not substance. The congressional commitment to equal rights under the law

[*] See the Appendix in *Sullivan*, No. 33, October Term 1969, pp. 121–122.

manifested by the enactment of the Civil Rights Act of 1866 cannot be served by viewing this case as a simple exercise in the fine art of conveyancing. The case involves far more. It is an attempt to secure what the proponents of the Act envisioned and the Supreme Court has preserved—the "great fundamental rights" of all men, whatever their race or color" to "acquire" and "dispose" of property. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 432 * * *.

Wholly apart from the transferable first option feature, however, the basic reality of the case inheres in the obvious fact that the sale or rental value of homes within the prescribed radius of Wheaton-Haven is enhanced by the availability of access to the pool as an incident of residence in the area. If that access is denied blacks because of their race, they either will be outbid for properties in the area by whites who receive the enhanced value or they will have to pay for a greater value than they receive. As a result, racial segregation of the entire neighborhood would be fostered by a discrimination directly contrary to the purpose of Section 1982, which, as earlier noted, is "to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man." *Jones*, *supra*, 392 U.S. at 443. Any possible doubt which may have remained after *Jones* that Section 1982 forbids such a result in the present context was dispelled, as already shown, by this Court's subsequent decision in *Sullivan*, which, we submit, the court of appeals should have followed here.

II. THE "PRIVATE CLUB" EXCEPTION TO THE CIVIL RIGHTS ACT OF 1964 IS NOT APPLICABLE HERE

As we earlier indicated, the court below also held that any violation of Section 1982 here is excused because Wheaton-Haven's admittedly discriminatory membership policy is permissible under the "private club" exemption in the Civil Rights Act of 1964, 42 U.S.C. 2000a(e). But that provision cannot properly be invoked in this case, both because Wheaton-Haven is not, under the established criteria, a "private club," and because, even if it were, the 1964 exemption provision does not apply as a limitation on the non-discrimination requirement of Section 1982.

1. As we have shown, there is little to distinguish the Wheaton-Haven facility from the Little Hunting Park facility that this Court determined in *Sullivan* not to be "a private social club" (396 U.S. at 236). Here, as in that case, the only real membership standard expressed in the association's by-laws is that the applicant must reside within a stated geographic area.[11] Every adult owning or leasing a home within the prescribed area is eligible, without more, to become a member. Approval by the membership or by

[11] While a limited number of persons residing outside that area could, on a member's recommendation, become eligible for membership, the same arrangement existed with respect to Little Hunting Park (see *supra*, p. 17, n. 10). Since nonresident-members could not exceed 30 percent of the full Wheaton-Haven membership—including those families who had once been resident members and moved from the area, but retained their membership as nonresidents—this feature of Wheaton-Haven's membership policy should no more be considered a basis for sustaining the claim of privacy than was the similar nonresident membership policy of Little Hunting Park, Inc.

the association's Board of Directors—which was also a requirement for membership in Little Hunting Park—is routinely given to whites (see n. 8, *supra*). There is, in short, no more "a plan or purpose of exclusiveness" (396 U.S. at 236) here than there was in *Sullivan*. What this Court said of the neighborhood association involved in that case has equal application here (*ibid.*): "It is open to every white person within the geographic area, there being no selective element other than race. See *Daniel* v. *Paul*, 395 U.S. 298, 301-302. What we have here is a device functionally comparable to a racially restrictive covenant, the judicial enforcement of which was struck down in *Shelley* v. *Kraemer*, 334 U.S. 1, by reason of the Fourteenth Amendment."

We agree with the dissent below (Pet. App. B–28) that a facility such as the one involved here should not be characterized as "private when its membership is so closely tied to real estate bought and sold on the open market." Such is the teaching of *Daniel* v. *Paul*, 395 U.S. 298. The "club" involved there was a large one, serving people from miles around; visitors purchased a low-cost "membership" each season and also paid to use certain facilities on each visit; such memberships were routinely issued to all whites who sought them, but refused to Negroes. Wheaton-Haven is much smaller in size, intended for the use and enjoyment of a limited number of families in a smaller geographic area; the initial membership fee is high and yearly fees are assessed so that it may meet expenses. But the administration of its membership policies—much the same as with Little Hunting Park—precisely

tracks that which characterised *Daniel* v. *Paul*: subject to the availability of memberships, any white adult living in the community could join; Negroes could not.

Just as in *Daniel* v. *Paul*, such a policy does not justify characterization of the facility as a private club. "Membership" which is based essentially on the geography of residence, and is readily transferable by an area homeowner through use of a first option at the time he sells his home (see pp. 18–20, *supra*), is the very antithesis of the private social club. See *Nesmith* v. *YMCA of Raleigh, N.C.*, 397 F. 2d 96, 102 (C.A. 4); and see *United States* v. *Richberg*, 398 F. 2d 523 (C.A. 5); *Rockefeller Center Luncheon Club, Inc.* v. *Johnson*, 131 F. Supp. 703 (S.D.N.Y.); *Bell* v. *Kenwood Golf and Country Club, Inc.*, 312 F. Supp. 753 (D. Md.). The well established hallmarks of privacy are missing: membership is not even personal to any individual; nor is any attempt made to achieve any sort of compatability of background or interest, save geography. See *Daniel* v. *Paul*, *supra*, 395 U.S. at 301–302; *Sullivan* v. *Little Hunting Park, Inc.*, *supra*.

2. At all events, this Court in *Sullivan* (396 U.S. at 237) expressly rejected "the suggestion that the public accommodations provision of the Civil Rights Act of 1964, 78 Stat. 243, in some way supersedes the provisions of the 1866 Act." [15] A comparable argument, pre-

[15] The new law and the old are substantially different. For example, Title II of the 1964 Act prohibits discrimination on the basis of "race, color, religion, or national origin" (Section 201(a)), while the 1866 Act presumably applies only to race or color discrimination. Although the 1866 Act, on its face, prohibits all racially motivated denials of the rights it protects,

mined on an interpretation of the Fair Housing Title of the Civil Rights Act of 1968 (42 U.S.C. 3601, *et seq.*) as repealing or qualifying the "property" provision of the 1866 statute, was similarly rejected in *Jones v. Alfred H. Mayer Co.*, *supra*, 392 U.S. at 413-417. And the courts of appeals have, but for the decision below, consistently declined to interpret subsequent civil rights legislation as impairing the sanction of Section 1 of the 1866 Act. See *Sanders* v. *Dobbs Houses, Inc.*, 431 F. 2d 1097 (C.A. 5) (specific remedies of Title VII of the 1964 Act do not preempt general remedial language of 42 U.S.C. 1981); *Young v. International Telephone & Telegraph Co.*, 438 F. 2d 757 (C.A. 3) (Title VII of 1964 Act does not impose jurisdictional barrier to suit under 1866 Act); *Caldwell* v. *National Brewing Co.*, 443 F. 2d 1044 (C.A. 5), certiorari denied, 405 U.S. 916 (same).

Moreover, Title II of the 1964 Act itself expressly preserves pre-existing rights under Federal law in the following terms (Section 207(b) of the Act, 42 U.S.C. 2000a-6(b)):

Title II applies only to certain types of establishments having some nexus with interstate commerce (Sections 201(b), 201(c)). The 1866 Act is couched in declaratory terms, without reference to any particular mode of enforcement, whereas Title II embodies a specific remedy provision (Section 204(a)). The new law—unlike the old—expressly provides for enforcement at the instance of the Attorney General (Section 206), and the 1964 Act also created a Community Relations Service to assist in the private settlement of disputes relating to discriminatory practices (Title X, Sections 1001a-1004, 42 U.S.C. 2000g-2000g-3) to which the courts may refer cases brought under Title II for the purpose of achieving voluntary compliance. Compare *Jones* v. *Alfred H. Mayer Co.*, *supra*, 392 U.S. at 417.

> * * * [N]othing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

It will be noted that only rights under laws "not inconsistent" with Title II remain enforceable. To the extent, however, that the 1866 Act prohibits racial discrimination by establishments which are not covered by Title II, it is not "inconsistent" with the 1964 Act in the ordinary sense that it contradicts the basic purpose of the new law (see *Sullivan* v. *Little Hunting Park, Inc., supra*, 396 U.S. at 238); it obviously is designed to vindicate basically similar and partially identical rights. See *United States* v. *Johnson*, 390 U.S. 563, 566.

There are of course many possible explanations for the limitations of the 1964 Act. Some were merely responsive to the Commerce Clause approach of the legislation and then prevailing constitutional doubts concerning the scope of congressional power under the Thirteenth and Fourteenth Amendments. Most likely, the full reach of the 1866 Act in this area was not then appreciated.[18] But it does not follow that

[18] 42 U.S.C. 1981 and 1982 were briefly noted in the hearings on the 1964 Civil Rights Act as at least prohibiting state-sanctioned discrimination in places of public accommodation (Hearings on S. 1732 before Senate Committee on Commerce, 88th Cong., 1st Sess., p. 134 (Senator Prouty and Attorney General Kennedy)). It does not appear, however, that Con-

any part of it was repealed *sub silentio* by the 1964 Act. On the contrary, the savings clause quoted above expressly preserves preexisting rights under federal law, and that provision is of course to be honored whether or not the reach of the 1866 Act was then fully recognized. See *Sullivan* v. *Little Hunting Park, Inc.*, *supra*, 396 U.S. at 237-238.

Accordingly, as this Court confirmed in *Sullivan*, the 1866 Act stands unimpaired. For the reasons elaborated above, Wheaton-Haven's refusal to approve Dr. and Mrs. Press' membership application as residents within the prescribed geographic area should be held to be violative of Section 1 of that statute, 42 U.S.C. 1982. The statutory right to purchase or lease cannot be fully meaningful unless the statute also reaches the conduct of those who have it within their power to prevent the Negro from enjoying the rights transferred. That Section 1982 does reach that conduct was the essence of this Court's holding in *Sullivan*. And, since the facts here are virtually identical in all material respects to those in *Sullivan*, the same result

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guess understood those infrequently-used statutes to have the reach which has been confirmed by this Court's construction in *Jones*.

Of course, the understanding of the legislators in 1964 as to the intent of their predecessors a century earlier is only very remotely relevant. Accordingly, just as the Court did not look to the drafters of the Fair Housing Law of 1968 to determine the scope of the 1866 Act with reference to the issue before it in *Jones*, here the Court's application of Section 1982 should not be affected by the views that can be ascertained on this subject in the 88th Congress.

vindicating the complainants' statutory rights should follow."

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the case remanded

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"Once it is recognized that under Section 1982 Negro residents of the area cannot be denied membership in Wheaton-Haven on racial grounds, it follows that racial discrimination in the pool's guest policy must also fail. Otherwise, Negro members would be placed in a disfavored racial category which would make them second-class members of the pool community and thus deprive them of the full enjoyment of their property rights. Compare the complaint of the incumbent Negro tenant in *Trafficante* v. *Metropolitan Life Ins. Co.*, No. 71-708, certiorari granted, February 22, 1972.

With this addition to its analysis, we agree with the dissent below (Pet. App. B-29): "Unquestionably Wheaton-Haven can limit the number of guests a member can bring. Similarly, it can refuse to admit guests, regardless of race, who, because of their demeanor or age would unduly burden the use of the pool. But otherwise valid limitations cannot be couched directly or indirectly to restrict the race of guests. The [Wheaton-Haven] membership is a valuable property right, an incident of which is the right to invite guests. The right would be empty indeed unless the guests have the right to accept. Racial restrictions on the right to invite guests, and to accept invitations, are racial restrictions on the right to hold property that violate § 1982. A white host can vindicate this right. *Walker* v. *Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969). Cf. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 * * *."

to the district court for the entry of an order giving appropriate relief.

Respectfully submitted.

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